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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 75

ILLINOIS CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1929

CERTIORARI GRANTED MAY 27, 1929

(34,183)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 8014

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 27, 1927.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1928, of said Court, before the Honorable Robert E. Lewis, the Honorable William S. Kenyon and the Honorable John H. Cotteral, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court
(Seal) of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-seventh day of October, A. D. 1927, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Illinois Central Railroad Company was Plaintiff in Error and G. I. Crail, doing business as P. McCoy Fuel Company, was Defendant in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 Complaint At Law.

In the District Court of the United States for the District of Minnesota, Fourth Division.

G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

Plaintiff complains of defendant and alleges that:

I.

(a) Plaintiff was during the times hereinafter mentioned, and still is, a resident, inhabitant, and citizen of said district of Minnesota, fourth division.

(b) Plaintiff is, and during the times hereinafter mentioned was, engaged in the fuel business at Minneapolis, Minnesota. Plaintiff's yard and place for delivery by common carrier of all coal transported to it, including that referred to herein is, and during the times herein referred to was an industry siding located at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

II.

Defendant was during the times hereinafter mentioned, and still is, a railway corporation of the state of Illinois, and a citizen thereof, and was during the times hereinafter mentioned, and still is, a common carrier of freight with its connecting lines from Royalton, Illinois, to Minneapolis, Minnesota.

III.

(a) September 30, 1922, at Royalton, Illinois, defendant as initial carrier received for transportation over its lines and those of its connecting carriers to Minneapolis, Minnesota, 88,700 pounds of southern Illinois number 2 nut soft coal, contained in PMCK&Y car number 91352, and then and there

issued and delivered its receipt or bill of lading therefor.

2 (b) While said coal was in transit plaintiff purchased it, became the owner thereof, and it was diverted to plaintiff at his said yard at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

(c) October 17, 1922, defendant caused to be delivered to plaintiff at its said yard at Minneapolis, Minnesota, 83200 pounds of said coal. Defendant or its connecting carriers lost 5500 pounds thereof.

(d) Said shipment was transported and said 83200 pounds of coal was delivered at destination within a reasonable length of time for said transportation.

(e) The fair market value of said 5500 pounds of coal lost from said shipment at destination on October 17, 1922, when it should have been delivered there as aforesaid, less lawful freight charges, was $26.87. No part of said sum has ever been paid.

IV.

This is a suit proceeding arising under the Act of Congress of February 4, 1887, and the several acts amendatory thereof, including the so-called Cummins Amendment, an act of Commerce of March 4, 1915, 38 Stat. L. 1196 as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and laws of the United States.

V.

Wherefore, plaintiff demands judgment against the defendant for $26.67 with interest thereon and plaintiff's costs and disbursements according to law.

Minneapolis, Minnesota, March 10, 1923.

STANLEY B. HOUCK
Attorney for Plaintiff,
746 McKnight Building,
Minneapolis, Minnesota.

(Endorsed) Filed March 10th, 1923. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

Answer

Defendant for its answer to the complaint of the plaintiff in the above entitled action denies each and every allegation, matter and thing in said complaint contained.

3 Wherefore defendant demands judgment that plaintiff take nothing by this action, and for defendant's costs and disbursements herein.

BROWN & GUESMER,
Attorneys for Defendant,
1000 Met. Life Bldg.,
Minneapolis, Minnesota.

(Endorsed) Due and personal service of the within answer is hereby admitted this 6 day of April, 1923. Stanley B. Houck, Attorney for Plaintiff. Filed April 6-1923. Joel M. Dickey, Clerk, By Thomas H. Howard, Deputy.

Stipulation of Facts

The parties to the above entitled action, through their respective attorneys, agree that he following facts may be received in evidence at the trial of the action in the same manner and with the same effect as if proved by competent testimony, subject to objection by either party on the ground that any of said facts are immaterial or irrelevant.

I.

(a) Plaintiff was during the times hereinafter mentioned, and still is, a resident, inhabitant, and citizen of said district of Minnesota, fourth division.

(b) Plaintiff is, and during the times hereinafter mentioned was, engaged in the fuel business at Minneapolis, Minnesota. Plaintiff's yard and place for delivery by common carrier of all coal transported to it, including that referred to herein, is, and during the times herein referred to was, an industry track located at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

II.

Defendant was during the times hereinafter mentioned, and still is, a railway corporation in the state of Illinois, and a citizen thereof, and was during the times hereinafter mentioned, and still is, a common carrier of freight, with its connecting lines from Royalton, Illinois, to Minneapolis, Minnesota.

III.

(a) September 30, 1922, at Royalton, Illinois, defendant as initial carrier received for transportation over its lines and those of its connecting carriers to Minneapolis,
4 Minnesota 88700 pounds of southern Illinois number 2 nut soft coal, contained in PMCK&Y car number

91352, and then and there issued and delivered the receipt or bill of lading therefor.

(b) While said coal was in transit, plaintiff purchased it, became the owner thereof, and it was diverted to plaintiff at his yard at 10th Avenue North East and Harrison Street, Minneapolis, Minnesota.

(c) October 17, 1922, defendant caused to be delivered to plaintiff at its said yard at Minneapolis, Minnesota, 83200 pounds of said coal. Defendant, or its connecting carriers, lost 5500 pounds thereof.

(d) Said shipment was transported and said 83200 pounds of coal was delivered at said destination within a reasonable length of time for said transportation.

IV.

This is a suit and proceeding arising under the Act of Congress of February 4, 1887, and the several acts amendatory thereof, including the so-called Cummins Amendment, an Act of Congress of March 4, 1915, 38 Stat. L. 1196, as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and Laws of the United States.

V.

(a) At the destination of said shipment on October 17, 1922, for a long time prior thereto, and ever since, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volumes.

(b) On or about October 17, 1922, at said destination the fair, reasonable, average, market value and price, delivered to the purchaser at his place of business or home, of the kind, size and grade of coal contained in said shipment in lots of 5500 pounds was $13.00 per ton, and said coal in said quantities could not then be purchased for less in said market.

(c) On or about October 17, 1922, the fair, reasonable, average market value and price for carload lots of from 60,000 to 120,000 pounds, where the coal became the purchaser's property at the time of shipment and he received
5 delivery on track at destination in carload lots, paid the freight and handled the shipment himself, was

$5.50 per ton f. o. b. Royalton, Illinois. Quantities less than carload lots were not obtainable at said time and place at said price.

(d) On or about October 17, 1922, the fair, reasonable, average market value and price for carload lots on track at Minneapolis was $5.75 per ton, plus freight where the purchaser paid the freight, received the shipment on track and himself handled the shipment. Quantities less than carload lots were not obtainable at said time and place at said price.

VI.

Defendant has paid plaintiff nothing whatsoever on account of the loss of coal aforesaid.

VII.

The lawful freight charges applicable to said shipment were $3.30 per ton. Said freight charges were not paid on the 5500 pounds lost.

VIII.

The coal contained in said shipment had not been sold nor had its sale been contracted for prior to the arrival of said shipment nor was it sold or contracted for sale on October 17, 1922. Plaintiff lost no sale because said coal was lost. Plaintiff did not at any time purchase any coal for the purpose of replacing the coal lost from this shipment. Plaintiff did, however, both before and after delivery of said shipment, purchase coal of the same kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business, and plaintiff ordinarily purchased his coal exclusively in carload lots f. o. b. mines, and on and after said October 17, 1922 plaintiff had on hand coal of the kind, size and grade in question in quantities sufficient to meet the demands of his business.

Dated at Minneapolis, Minnesota April 6, 1923.

STANLEY B. HOUCK
Attorneys for Plaintiff.

BROWN & GUESMER
Attorneys for Defendant.

(Endorsed) Filed April 6, 1923, Joel M. Dickey, Clerk, By Thomas H. Howard, Deputy.

6 Bill of Exceptions.

United States District Court District of Minnesota, Fourth Division.

G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

Now Be It Remembered That on the trial of this cause at this term, on this, the 29th day of October, A. D. 1926, in the District Court of the United States for the District of Minnesota, Fourth Division, the Honorable William A. Cant, Judge presiding, the plaintiff appearing by his attorney, Mr. Stanley B. Houck, of Minneapolis, Minnesota, and the defendant appearing by its attorneys, Mr. Edward C. Craig, of Chicago, Illinois, and Messrs. Guesmer, Carson, Brown & Loughin, and Mr. Edwin C. Brown, of Minneapolis, Minnesota, the following proceedings were had:

A stipulation waiving a jury and agreeing to a trial of the said case by the court without a jury, was entered into between the parties and was filed, which stipulation was in words and figures as follows, to-wit:

7 Stipulation Waiving Jury.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, through their respective attorneys, that said action, now on the September term calendar of said Court, may be tried before the Court without a jury, a jury being hereby waived by both of said parties.

Dated this 28th day of October, 1926.

STANLEY B. HOUCK
Attorney for Plaintiff.

E. C. CRAIG
Chicago, Illinois.

BROWN & GUESMER
EDWIN C. BROWN and
CHAS. A. LOUGHIN
Minneapolis, Minnesota.
Attorneys for Defendant.

Be It Further Remembered That the parties to this suit entered into a stipulation as to the facts in the case, which stipulation was reduced to writing and and signed by the attorneys

of the respective parties and filed with the Clerk, which stipulation of facts was in words and figures as follows, to-wit:

8 Stipulation of Facts.

The parties to the above entitled action, through their respective attorneys, agree that the following facts may be received in evidence at the trial of the action in the same manner and with the same effect as if proved by competent testimony subject to objection by either party on the ground that any of said facts are immaterial or irrelevant, and this stipulation shall supersede the stipulation of facts heretofore filed herein.

I.

(a) Plaintiff was during the times hereinafter mentioned and still is a resident, inhabitant and citizen of said District of Minnesota, Fourth Division.

(b) Plaintiff is, and during the times hereinafter mentioned was, engaged in the fuel business at Minneapolis, Minnesota. Plaintiff, during all the times herein referred to, has conducted his said business in all respects in a manner substantially similar to the manner in which other similar fuel businesses in Minneapolis aforesaid were then conducted.

(c) The place for delivery by common carrier of coal transported to the plaintiff, and other similar fuel dealers at Minneapolis, including the coal referred to herein, is, and during the times herein mentioned was an industry, team, or other railroad delivery track, located on any railroad in Minneapolis, and, in the case of the car of coal herein referred to, was an industry track located at 10th Avenue Northeast and Harrison Street, Minneapolis, Minnesota, at which place plaintiff's coal yard was and is situated.

II.

The defendant was during the times hereinafter mentioned, and still is, a railway corporation in the State of Illinois, and a citizen thereof, and, with its connecting lines, was during the times hereinafter mentioned, and still is, a common carrier of freight from Royalton, Illinois, to Minneapolis, Minnesota.

III.

9 (a) On September 30, 1922, at Royalton, Illinois, defendant as initial carrier received for transportation over its lines and those of its connecting carriers at Minneapolis, Minnesota, P. M. C. K. & Y. car number 91352, containing 88,700 pounds of Southern Illinois No. 2 nut soft coal, and

then and there issued and delivered a receipt or bill of lading for the said carload of coal.

(b) While said car of coal was in transit, plaintiff purchased the said carload of coal and became the owner thereof, and the said car was diverted to the plaintiff, and was, in accordance with plaintiff's directions thereafter given, delivered to the plaintiff on the said industry track at the plaintiff's said coal yard at Minneapolis, Minnesota.

(c) On October 17, 1922, the defendant caused to be delivered to plaintiff on the said industry track at the plaintiff's said coal yard at Minneapolis, Minnesota, the said car number 91352. The said car at that time contained 83,200 pounds of coal, being 5500 pounds of coal less than the said 88,700 pounds of coal, which said portion of said carload of coal, consisting of 5500 pounds of coal, had been lost in transit.

(d) Said car of coal was delivered at said destination within a reasonable time for said transportation.

IV.

This is a suit and proceeding arising under the Act of Congress of February 4, 1887, and the several acts amendatory thereof, including the so-called Cummins Amendment, an Act of Congress of March 4, 1915, 38 Stat. L. 1196 as amended by 41 Stat. L. 494, and is a suit and proceeding arising under the Constitution and Laws of the United States.

V.

(a) At the destination of said shipment, on or about October 17, 1922, and for some time prior and subsequent thereto, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volume. Purchases of carload lots, containing 60,000 pounds or more, in said market are termed wholesale purchases and purchases of less than carload
10 lots are termed retail purchases.

(b) On or about October 17, 1922, and for a substantial period of time prior and subsequent thereto, the fair, average, reasonable, market value and price of carload lots of said Southern Illinois No. 2 nut soft coal containing 60,000 pounds or more where the coal became the purchaser's property at the time of shipment, or it was purchased in transit, as was done by the plaintiff in this case, and purchaser re-

ceived delivery in carload lots in the car on any industry, team, or other railroad delivery track located on, or connected with, any railroad in Minneapolis, paid the freight and unloaded the shipment himself, including a delivery such as was made to plaintiff in this case, was $5.50 per ton f. o. b. original shipping point of the carload, which in this instance was f. o. b. Royalton, Ill. Quantities of less than carloads were not obtainable in said market at said time and place at said price.

(c) On or about October 17, 1922, the fair, reasonable, average market value and price at Minneapolis, Minnesota, of carload lots of Southern Illinois Number 2 nut soft coal on track at Minneapolis as aforesaid, including the said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track and himself unloaded the shipment as was done by the plaintiff in this case. Quantities of less than carload lots were not obtainable in said market at said time and place at said price.

(d) On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less. At and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid.

VI.

Defendant has paid plaintiff nothing whatsoever on account of the loss of the coal aforesaid.

11 VII.

The lawful freight charges applicable to said shipment were $3.30 per ton. This was at the carload tariff rate. The freight charges were paid on the said car of coal so delivered to the plaintiff at the time aforesaid, based upon 83,200 pounds of coal therein.

VIII.

The coal contained in said shipment had not been sold by plaintiff nor had its sale been contracted for prior to the arrival of said shipment, nor was it sold or contracted for sale on October 17, 1922, but the coal contained in said car PMCK&Y

No. 91352 was added to the general stock of coal of the plaintiff at Minneapolis, aforesaid, and had this 5500 pounds of coal been contained in this car it would have been added to the general stock of coal of the plaintiff at Minneapolis, aforesaid. Plaintiff lost no sale of coal because the said car of coal contained only 83,200 pounds of coal. Plaintiff did not at any time purchase any coal for the purpose of replacing any coal lost from this shipment, except the purchase in carload lots to maintain his stock of said Southern Illinois No. 2 nut soft coal, of that kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business; and plaintiff and other fuel dealers at said time ordinarily purchased coal exclusively in carload lots f. o. b. mine. That had this car of coal when shipped from the mine contained only 83,200 pounds of coal, the plaintiff would have purchased it. That on and after said October 17, 1922, plaintiff had on hand coal of the kind, size and grade in question, in quantities sufficient to meet the demands of his business and the failure to receive the 5500 pounds of coal aforesaid in no way interfered with the maintaining by the plaintiff of his ordinary and usual stock of coal, nor did he purchase any coal to take its place, except by the purchase of coal in carload lots of $5.50 per ton f. o. b. mine in the regular and cus-
12 tomary course of his business. Defendant's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track. The unloading of the coal and the further handling of the same for sale or delivery in less than carload lots was at the expense of the plaintiff.

Dated at Minneapolis, Minnesota, this 27 day of Sept., A. D. 1926.

STANLEY B. HOUCK,
Attorney for Plaintiff.

BROWN & GUESMER,
EDWIN C. BROWN,
CHARLES A. LOUGHIN,
Minneapolis, Minn.

E. C. CRAIG,
Chicago, Ill.
Attorneys for Defendant.

Be It Further Remembered That in accordance with the provisions of the said stipulation the plaintiff filed his written objections to the admission in evidence of portions of the facts

agreed to in the said stipulation of facts, which objections were in words and figures as follows, to-wit:

13 Plaintiff's Objections to Evidence.

The above named plaintiff objects to the admittance in evidence and consideration by the Court of the following portions of the Stipulations of Facts dated September 27, 1926, heretofore filed in said case on the ground that said facts and evidence are immaterial and irrelevant:

I.

That portion of section V, subdivision (a) which reads: "Purchases of carload lots, containing 60,000 pounds or more, in said market are termed wholesale purchases and purchases of less than carload lots are termed retail purchases."

II.

That portion of section V, subdivision (d) which reads: "At and prior to the time of delivery of said shipment less than carload lots of coal has not been sold in said market and delivered to or into any car on track as aforesaid."

III.

All of section VIII of said Stipulation; and each separate fact stated in said section VIII considered separate and distinct from each other fact therein stated.

Dated at Minneapolis, Minnesota, this 25th day of October, 1926.

STANLEY B. HOUCK,
Attorney for Plaintiff,
310 McKnight Building,
Minneapolis, Minnesota.

Be It Further Remembered That in accordance with the provisions of the said stipulation the defendant filed its written objections to the admission in evidence of portions of the facts agreed to in the said stipulation of facts, which objections were in words and figures as follows, to-wit:

14 Defendant's Objections to Admissibility of Certain Stipulated Facts.

Defendant hereby objects to the admissibility in evidence, on the trial of the above cause now on the jury waived September term calendar of the above named court, of the whole

or any part of the following portions of the stipulated facts herein as set forth in the Stipulation of Facts dated September 27, 1926:

1. That part of paragraph (b) of V of said Stipulation reading as follows:

"Quantities of less than carloads were not obtainable in said market at said time and place at said price."

2. That part of paragraph (c) of V of said Stipulation reading as follows:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price."

3. That part of paragraph (d) of V of said Stipulation reading as follows:

"On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

The grounds of defendant's said objections to the said evidence and facts thereby shown are that said evidence and facts thereby shown, and the whole and every part thereof, are immaterial and irrelevant to any issue in this case.

Dated this 29 day of October, 1926.

EDWARD C. CRAIG,
Chicago, Illinois.

BROWN & GUESMER,
EDWIN C. BROWN and
CHAS. A. LOUGHIN,
Minneapolis, Minnesota.
Attorneys for Defendant.

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15 Be It Further Remembered That, in accordance with the provisions of the stipulation of facts, the defendant made during the progress of the trial its motion to the Court that the Court make and file its order striking from the record, as immaterial and irrelevant to any issue in the

case, that portion of paragraph (b) of V of said stipulation reading as follows:

"Quantities of less than carloads were not obtainable in said market at said time and place at said price."

Be It Further Remembered That, in accordance with the provisions of the stipulation of facts, the defendant made during the progress of the trial its motion to the Court that the Court make and file its order striking from he record, as immaterial and irrelevant to any issue in the case, that portion of paragraph (c) of V of said stipulation reading as follows:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price."

Be It Further Remembered That, in accordance with the provisions of the stipulation of facts, the defendant made during the progress of the trial its motion to the Court that the Court make and file its order striking from the record, as immaterial and irrelevant to any issue in the cae, that portion of paragraph (d) of V of said stipulation reading as follows:

"On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

16 Be It Further Remembered That the said case came on to be heard on the aid stipulation of facts subject to the objections of the said parties to portions thereof, and the said case was heard by the Court without a jury on the said stipulation of facts subject to the said objections, no other evidence having been introduced by either party.

Be It Further Remembered That at the close of all the evidence, and during the progress of the trial, the defendant made and filed its motion in writing that the Court make and file its order that judgment be entered herein against said defendant and in favor of the plaintiff for the sum of $15.82 and interest thereon at the rate of 6 per cent per annum

since October 17, 1922, together with plaintiff's costs and disbursements, which motion was in words and figures as follows, to-wit:

Motion by Defendant for Judgment.

Now comes the Illinois Central Railroad Company, defendant above named, at the close of all the evidence and during the progress of the trial, and before the court has made any findings herein and before judgment is rendered by the court, and moves the court for an order that judgment be entered herein, against said defendant and in favor of plaintiff, for the sum of $15.82 and interest thereon at the rate of 6% per annum since October 17, 1922, together with plaintiff's costs and disbursements accrued and expended to date, and for no more.

The said sum of $15.82 is the value of the lost portion, 5500 pounds, of the carload of coal involved herein, based and computed upon the agreed carload market value of such coal at Minneapolis on the date of delivery, October 17, 1922, $5.75 per ton.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant,
By Edward C. Craig,
Brown & Guesmer,
Edwin C. Brown and
Chas. A. Loughlin,
Its Attorneys.

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17 Be It Further Remembered That the Court, after hearing the arguments of counsel on the case so submitted and on the said motions, took the case under advisement until the 23d day of September, A. D. 1927, at which time the Court overruled the said objections of the plaintiff to the admission in evidence, as irrelevant and immaterial, of the portions of the said stipulation of facts with reference to which the plaintiff had made his said objections above set forth; overruled the said objections of the defendant to the admission in evidence, as irrelevant and immaterial, of the portions of the said stipulation of facts with reference to which the defendant had made its said objections above set forth; overruled the motions of the defendant in which the defendant moved the Court to strike from the record, as being irrelevant and immaterial, those certain portions of the stipulation of facts above specified in defendant's said motions, to each of which rulings of the Court the

defendant then excepted and now excepts; denied the motion of the defendant above set forth and made at the close of all the evidence and during the progress of the trial that the Court make and file its order that judgment be entered herein against said defendant and in favor of the plaintiff for the sum of $15.82 and interest, costs and disbursements; and made and filed its order that judgment be entered herein against said defendant and in favor of the plaintiff for the sum of $26.68 with interest thereon at the rate of 6 per cent per annum since October 17, 1922, and for costs and disbursements, to which rulings of the Court the defendant then and there excepted and now excepts.

Be It Further Remembered That the Court filed its special findings of facts and conclusions of law and by its conclusion of law found that

"Plaintiff is entitled to judgment against defendant for the sum of $26.68, with interest thereon at the rate of 6 per cent per annum since October 17, 1922, and for his costs and disbursements herein."

To this conclusion of law and ruling this defendant then and here excepted and now excepts.

18 Be It Further Remembered That in and by the Court's memorandum attached to its findings of fact, conclusions of law and order for judgment, and by said order made a part thereof, the Court found that the revised stipulation of facts did not materially differ from the former stipulation of facts, which finding is stated in said memorandum as follows:

"This court is not satisfied that the amended stipulation of facts justifies the conclusion that the case has been substantially changed."

To this finding and ruling this defendant then and there excepted and now excepts.

Be It Further Remembered That judgment was thereupon then and there entered by the Court for the plaintiff and against the defendant for the sum of $34.58 and costs, in accordance with the findings of facts and conclusions of law, to the entering of which judgment the defendant then and there excepted and now excepts.

And the defendant prays that this its above bill of exceptions be allowed, settled and signed.

Dated this 21st day of October, 1927.

EDWARD C. CRAIG,
GUESMER, CARSON,
BROWN & LOUGHIN,
EDWIN C. BROWN,
Attorneys for Defendant.

---

19 Stipulation for Approval of Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to the above entitled action, through their respective attorneys, that defendant's bill of exceptions hereto attached may be allowed, settled and signed by the Court, without other or further notice to either party hereto.

Dated this 21st day of October, 1927.

STANLEY HOUCK
Attorney for Plaintiff.
EDWARD C. CRAIG
GUESMER, CARSON, BROWN &
LOUGHIN
EDWIN C. BROWN
Attorneys for Defendant.

Certificate of District Judge to Bill of Exceptions

Having examined the defendant's bill of exceptions hereto attached and having found it to be in accordance with
20 the facts, and having read the above stipulation of Counsel for approval thereof, defendant's bill of exceptions hereto attached is hereby settled and allowed.

Dated this 22nd day of October, 1927.

WM. A. CANT
United States District Judge.

(Endorsed) Filed Oct. 22, 1927, Joel M. Dickey, Clerk By Thomas H. Howard, Deputy.

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21 Findings of Fact and Conclusions of Law.

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1927.

September 23, 1927.

Friday morning; Court opened pursuant to adjournment.

Present: Honorable Wm. A. Cant, Judge.

G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

The above-entitled action came on regularly for trial before the court without a jury, Mr. Stanley B. Houck, of Minneapolis, Minnesota, appearing for the plaintiff, and Mr. Edward C. Craig, of Chicago, Illinois, and Messrs, Guesmer, Carson, Brown & Loughin and Mr. Edwin C. Brown, of Minneapolis, Minnesota, appearing for the defendant. Mr. George A. Kinsley, of Minneapolis, Minnesota, appeared as amicus curiae. The court having considered the amended stipulation of facts in said case and the arguments of counsel therein and being fully advised in the premises, now makes and files the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. That at all times herein mentioned plaintiff was engaged at Minneapolis, Minnesota, in the business of buying and selling coal, and owned and operated a yard for the handling and distribution of coal received by rail. That delivery of coal to plaintiff at said yard, in carload lots, was commonly made on an industry railroad track, so called, at said yard.

2. That on September 30, 1922, at Royalton, Illinois, defendant as initial common carrier received for transportation to Minneapolis, Minnesota, under a uniform bill of lading, a carload of 88,700 pounds of Southern Illinois No. 2 nut soft coal; and that during transit the coal became the property of the plaintiff.

3. That on October 17, 1922, defendant caused to be
22 delivered to plaintiff, on said industry track, in the car in which said shipment had been made, at his

said yard at Minneapolis, 83,200 pounds of said coal; that 5,500 pounds of said coal was lost in transit; and that said transportation and delivery were made within a reasonable time.

4. That at said destination, on and about said October 17, 1922, there existed a free and ready market for the sale and purchase of coal of said kind, size and grade, both in carload and less than carload lots. Purchases of carload lots, containing 60,000 pounds or more, in said market, were then termed wholesale purchases, and purchases of less than carload lots were termed retail purchases.

5. That on October 17, 1922, and for a substantial period of time prior and subsequent thereto, the fair, average and reasonable market value and price of carload lots, at Minneapolis, Minnesota, containing 60,000 pounds or more of coal, such as that involved in this action, where the coal became the purchaser's property at the time of shipment, or or where it was purchased in transit, as was done by the plaintiff in this case, and where the purchaser received delivery in carload lots in the car on any industry, team or other railroad delivery track, located on or connected with any railroad in said city, and where the purchaser paid the freight and unloaded the shipment himself, including a delivery, such as was made to plaintiff in this case, was $5.50 per ton f. o. b. original shipping point of the carload, which in this instance was f. o. b. Royalton, Illinois. Quantities of less than carload lots were not obtainable in said market at said time and place at said price.

6. That on or about October 17, 1922, the fair, reasonable and average market value and price at Minneapolis,
23 Minnesota, of carload lots of coal such as that involved in this action, on track at Minneapolis as aforesaid, including said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track, and himself unloaded such shipment, as was done by the plaintiff in this case. Quantities of less than carload lots were not obtainable in said market at said time and place at such price.

7. That on or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable and average market value and price of coal such as that here involved, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5,500 pounds, was $13. per ton, including freight, and said

coal in said quantity to be delivered to the purchaser, for consumpetion or any other use, could not at said time have been purchased in said market for less than said amount. That at and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid.

8. That the lawful freight charges applicable to said shipment were $2.30 per ton; and that said freight charges were not paid on the 5,500 pounds lost.

9. That the coal contained in said shipment had not been sold, nor had its sale been contracted for by plaintiff prior to, or at the time of delivery at destination; that the plaintiff lost no sale because said coal was lost; that plaintiff did not at any time purchase 5,500 pounds of coal for the purpose of replacing the coal lost from this shipment; that plaintiff did, however, both before and after delivery of said shipment, purchase coal of the same kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine, in the
24 regular and customary course of his business; and that on and after said October 17, 1922, plaintiff had on hand coal of said kind, size and grade in quantities sufficient to meet the demands of his business.

10. That defendant has paid plaintiff nothing whatsoever on account of the loss of said 5,500 pounds of coal.

Conclusions of Law.

That plaintiff is entitled to judgment against defendant for the sum of $26.68, with interest thereon at the rate of six per cent. per annum, since October 17, 1922, and for his costs and disbursements herein.

Let judgment be entered accordingly.

The memorandum heretc attached is hereby made a part hereof.

A stay of proceedings for thirty days from the date hereof is hereby ordered.

Dated September 23, 1927.

By he Court

WM. A. CANT
U. S. District Judge.

25 (Judgment.)

Wherefore, by reason of the premises aforesaid it is now by the Court

Considered, ordered and adjudged that the plaintiff G. L. Crail, doing business as P. McCoy Fuel Company, do have and recover of and from the defendant Illinois Central Railroad Company, the sum of Thirty four and 58/100 Dollars ($34.58), together with his costs and disbursements in this behalf expended to be taxed, and that said plaintiff do have execution therefor.

Further ordered that all further proceedings herein except the taxation of costs and entry of judgment therefor be and the same are hereby stayed for a period of thirty (30) days to enable this defendant to prepare and present a bill of exceptions and make a motion for a new trial.

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26 Memorandum.

This is an action brought by the consignee of a carload of coal against the railroad company which had undertaken to transport the coal. The amount of the shipment was 88,700 pounds. Of this amount 5,500 pounds were lost in transit. The destination was Minneapolis, Minnesota, and the delivery was on an industry railway track running alongside of or into plaintiff's coal yard at that place. It is agreed that at the time and place of delivery, coal of the kind here in question was worth $5.75 per ton, plus freight, in carload lots of from 60,000 to 120,000 pounds. It is also agreed that the same kind of coal at retail in the Minneapolis market, at the time in question, delivered at the place of business or home of the consumer, was worth $9.70 per ton, plus freight. Plaintiff claims that he is entitled to recover at the rate of $9.70 per ton for the coal which was lost. Defendant admits liability, but claims that the amount of recovery should be limited to $5.75 per ton. No freight was paid on the coal which was lost and that item may be eliminated from the discussion. The facts were presented to the court originally by stipulation and the opinion of this court thereon is found at 2 Fed. (2d) 287. That case was reversed by the Circuit Court of Appeals and the opinion thereon is found at 13 Fed. (2d) 459. The appellate court there held that a recovery should be had on the basis of $9.70 per ton. Thereafter the stipulation of facts was amended and amplified and with the stipulation so changed the case was again presented to the court on a second trial. This court is not satisfied that the amended stip-

ulation of facts justifies the conclusion that the case has been substantially changed. Following the decision of the Court of Appeals, therefore, it is the duty of this court to allow a recovery at the rate of $9.70 per ton for the coal which was lost, and this will be done.

The case, however, is of rather unusual interest and importance. It is assumed that it is not inconsistent with the fullest measure of respect for the Appellate Court, to offer further suggestions in the interest of justice upon the questions involved. It it is for this court to follow the decision of the Appellate Tribunal, but that Tribunal itself may at some time wish to re-examine the matters which are here in con-
27 troversy. It is in that light and for that purpose only that the suggestions which follow, are made.

The case at bar is the ordinary case of a commodity purchased in bulk for the purpose of selling the same again at an advance, if possible, but without any necessity or occasion for going into the local market to replace any portion of the commodity which might be lost in transit. Under the circumstances hereinbefore set forth, as amplified by the stipulation of fact, what is the measure of damages in this case? Is plaintiff entitled to recover at the rate of $5.75 per ton, or at the rate of $9.70 per ton for the coal which has been lost?

Basically, the case is one for the recovery of damages for breach of contract. This particular controversy belongs to a sub-class of breach of contract cases. It involves a breach by a common carrier of its agreement to transport and deliver freight. The same general rules apply here as in all other cases of breach of contract. It will be seen that certain subsidiary rules are specially applicable. The difficulty in such cases arises in estimating the amount of the loss which the plaintiff has sustained. The courts have said that in this connection each case must be governed by its own facts. Mangin vs. Dinsmore, 62 N. Y. 35. Magdeburg General Insurance Co. vs. Paulson, 29 Fed. 530, 532. This does not mean that the cases are beyond the rules. They are not; it is at this point that the subsidiary rules intervene.

In the former opinion of this court certain outstanding features of the case were not made sufficiently clear.

1. Cases of the character here in question fall into certain groups or classes, and rules which apply to one class quite often do not apply to another. A classification upon one basis is as follows:

a. Cases where general damages only are involved.

b. Cases where special damages are claimed.

Upon another basis the classification may be as follows:

a. Cases where the consignee is under no necessity or compulsion to go into the local market and purchase commodities with which to replace those which have been lost.

b. Cases where by reason of special circumstances the consignee is under some reasonable compulsion to replace the lost commodity by purchasing in the local market.

There are doubtless other classifications of less importance.

The classifications above specified may very nearly duplicate each other. That is, all cases where there is no necessity of replacing the lost commodity would generally fall under the head of general damage cases; and very generally cases where the lost commodity must be replaced would fall under the head of special damage cases, but the distinguishing features of both classifications are important, because sometimes one basis of classification is emphasized by the courts and sometimes another, and because collectively they furnish the
28 bases for the various rules which are announced; which rules, as applied to a particular situation may be quite correct, but which if applied to a different set of facts may work an injustice.

2. The fundamental rule in all cases involving damages for breach of contract is that the damages recoverable are such only as, in theory of law, may fairly be said to have been within the contemplation of the parties when the contract was made.

17 C. J. 742-746, Sec. 76.
Harvey vs. Conn. & Passumpsic R. R. 124 Mass. 421, 423-4.

By the expression "general damages" is meant such damages as follow naturally and in the usual course of things from a breach of contract. In all ordinary cases it is general damages only which are held to have been within the contemplation of the parties. In such cases the question is what is the immediate loss without going beyond the first step.

17 C. J. 712, Sec. 20.
17 C. J. 742, Sec. 76.

"Special damages" are such as do not follow naturally or in the usual course of things from such a breach, but are such as arise out of unusual or special circumstances. Such cir-

cumstances, however, give rise to no claim for additional or special damages on account thereof, unless the circumstances were known in advance by the respective parties, and unless the consequences of the breach and loss under such circumstances were known to and in contemplation of the parties when the contract was made.

17 C. J. 712, Sec. 76.
17 C. J. 746, Sec. 77.

3. In this case plaintiff sues for general damages only. There is no allegation of special damages in the complaint and no proof thereof in the stipulation of facts.

Here, if the fact is at all important, there is no claim or proof that, prior to the loss in question, defendant had any knowledge that the coal was being purchased for the retail trade; and the circumstance of such intended use appears, if at all, only as a matter of inference from the stipulated facts.

4. In cases such as the one at bar, therefore, where general damages only are claimed, a recovery for proximate loss only can be had,—a loss which follows naturally and in the usual course of things from the breach of contract. This is an unvarying rule to which there are no exceptions. With subsidiary rules there may be variations or exceptions. In such cases as this the court does not go beyond the first step, nor concern itself with consequences which are remote. Southern Pacific Co. vs. Darnell-Taenzer Co. 245 U. S. 531, 533. The question is what loss plaintiff had sustained at the moment the car of coal was switched into his yard, with the 5,500 pounds missing therefrom. It is not what loss might be figured out at a later time under entirely new and different conditions. Plaintiff's cause of action accrued at once upon failure to deliver and without waiting for later events. Southern Pacific Co. vs. Darnell-Taenzer Co. supra, p. 534.
29 It made no difference whether the coal was to be sold at wholesale or at retail, or was to be consumed by plaintiff himself. The proximate loss "is the loss of what the contractee would have had if the contract had been performed." Chi. M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co. 253 U. S. 97. In this case that would have been the 5,500 pounds of coal in the car, which amount of coal at the time of delivery, was missing therefrom

5. A subsidiary rule, applicable in cases of this character, is that plaintiff is entitled to recover the value of the commodity which has been lost, as that value would have been at the time and place of delivery if delivery had been made as agreed.

This rule is more elastic. In its application it does not always mean the same thing. Courts are often content with announcing the general rule without discussion as to its application. In various cases there is no difficulty about such application. In other cases the difficulty is very real. In various cases, as will be seen, this rule does not apply at all in any literal sense and would provide no adequate relief.

In the case at bar the broader, general and controlling rules must constantly be kept in mind; the plaintiff is entitled to be made whole. He is not suing for coal, but for money. He is entitled to the money equivalent of that which has been lost. There is no occasion for punishing the defendant by allowing excessive damages. There is no occasion for allowing plaintiff to realize a gain out of the transaction. He is not to receive a reward. He is to receive fair and reasonable compensation for his loss.

6. An unusual and outstanding feature of this case is the fact agreed upon, as to the value which the missing coal would have had at the time and place of delivery, if it had been delivered as agreed. There is no such element in the cases relied upon by plaintiff. Here it is agreed to and is one of the settled facts in the case, and is beyond controversy, that if the coal which was lost had not been lost, but had been delivered to plaintiff with the other coal in the car, its value in such car at destination in plaintiff's yard would have been $5.75 per ton. This value so agreed upon must be understood to be the true value in the car at the time and place in question for any and all uses to which the coal might be put.

If plaintiff had received the coal in question, he would have had in his possession a commodity which all agree was of the value of $5.75 per ton. If he had it not, he obviously, so it may be urged, sustained a loss in that amount per ton on account of that which had been lost. The carload of coal, when it reached plaintiff's yard, was worth that much less than it would have been if none had been lost. We are enabled to determine the amount in this particular case, because here we have the unusual experience of being provided with data showing value at the immediate time and place of delivery. If the car had been delivered intact, the coal therein would have been worth $255.0125. As actually delivered, with the lost coal out, it was worth $239.20. This is all agreed to. There is no cavil about it. The difference of $15.8125 would ordinarily be regarded as the loss which plaintiff must have sustained. This would be stopping at the first step, without inquiry into later conditions which might arise or

develop, and without considering whether the coal was to be sold at wholesale, or at retail, or was to be consumed by the consignee.

7. Notwithstanding the foregoing considerations, it is urged by plaintiff that even in such a case as this, where we know the value of the coal at destination, the plaintiff is entitled to recover, not that value, but a considerably greater amount, represented by the retail selling price of such coal at such place. The reasons assigned are:

a. That if plaintiff had received the coal according to agreement, he could have sold it at the retail price; and

b. That if plaintiff had wished to replace the missing commodity, he would have been obliged to pay the retail price at destination for the coal which he would purchase.

These reasons may be considered in their order.

(a) The value per ton in the car, $5.75, allows plaintiff an advance of $.25 per ton over the mine price. Some, or all of this is profit. That is included in the proximate loss which the plaintiff sustained through non-delivery. In this respect the case is similar to Chi. M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, where the advance was somewhat over $200 on an entire carload of wheat which was lost. No retail prices were involved in the McCaull-Dinsmore case. The spread between this value of the coal in the car, and the retail price thereof, all at destination, is $3.95 per ton. But a large part of this is absorbed in the operation of retailing. The coal must first be unloaded from the car. It must then be sold to some customer. It must next be reloaded into trucks or wagons, and then transported perhaps several miles to the place of business or home of the consumer, and there delivered to him. The stipulation of facts is to the effect that it is only after all this has been done that the $9.70 per ton can be realized. Along therewith there has been the overhead expense, the insurance, the making of collections, the risk of and allowance for bad debts, and the directing services of the plaintiff himself. We know that the aggregate of these items amounts to a considerable sum per ton. The plaintiff has not advised us thereof in detail. To get his $3.95 per ton, he is obliged to pay out a good part thereof in the course of the retailing operation, and besides must render or provide proper supervision as well. We do not know the amount of the net profit. It must be a rather modest sum. In any event, such profit, no doubt, bears some proper relation to

the original cost of the coal and to the risks which are assumed and the expenses which are incurred and the considerable service which is rendered in connection with the retail trade. The $3.95 per ton is the sum of legitimate and necessary additions to the carload price, which must be made in
31 connection with the retail operations in order that those operations may be successfully carried on. All this, however, is remote from the time, place and circumstances which should determine the amount of plaintiff's proximate loss. By the decision in this case we are awarding plaintiff $3.95 per ton over the carload price. This is much better for him than to have received the coal. He gets the full retail price without any risk or expense and without the work of any retail operations whatever. Had he received the coal, it is hardly possible that he could have realized net thereon, above cost and above the necessary expense of the retail operations, more than from $1.00 to $1.25 per ton. As to the figures, this is in part speculation, but necessary speculation, in as much as accurate information has not been adduced by the contending parties, but no matter what the precise figures may be, the conclusion must be the same,—that looked at from the standpoint now under consideration, the award is substantially in excess of any legitimate loss which the plaintiff has sustained. In the face of many authorities against the allowance of profits in such cases, it is barely possible that net profits at retail might be allowed here, but that would be in violation of the rule limiting the recovery in such cases to damages for the proximate loss, and in any event, we have no definite information as to what the profits would have been. It is quite clear that the considerable amount per ton necessarily expended in carrying on the retail operations could not, upon any legitimate theory, be included in the recovery here.

In 4 Sutherland on Damages, 4th Ed. Sec. 1098, p. 4178, the rule said to be applicable in such cases, and which is frequently quoted by the authorities, is stated as follows: "The retail price of property held for sale is not the standard by which its value is to be determined. Where a quantity of merchandise is sued for, the retail price would be unjust, for the merchant in fixing that price takes into consideration, not only the first cost of the goods, but store rent, clerk hire, insurance and probable amount of bad debts, and adds to all these a percentage of profit. This must be understood of a considerable quantity, not of a single article."

In theory of law, and presumably as a matter of fact, it was as advantageous to plaintiff to sell this coal at $5.75

per ton in the car, as it would have been to sell the same coal at $9.70 per ton at retail. The former price allowed a reasonable advance over the mine price, considering the risks assumed and the service required in connection therewith; the latter allowed a reasonable advance, we may assume, over the cost of the coal and the necessary risks, expense and service in connection with the retail operations. Looking forward to selling the coal at retail, or to making any other use thereof, it was worth in the car the sum of $5.75 per ton and no more. After the lapse of some period of time and under changed conditions, and after the expenditure of considerable effort and the incurring of considerable expense, plaintiff might have sold the coal for the gross sum of $9.70 per ton. Does that fairly measure his proximate loss on account of the non-delivery thereof?

32 (b) Another reason assigned for recovery here on the basis of the retail price per ton, is that if plaintiff would have been obliged to pay the retail price therefor. Inferentially it is assumed in such claim that plaintiffs have the right in all such cases to go into the market and buy at retail for the purpose indicated. Such statements of the rule has crept into the law and has been given a somewhat general application, because in some of the earlier cases and in various other cases since, the circumstances have been such that the claimant had the right to go into the market and replace the commodity which had been lost. This was sometimes in the wholesale market, and sometimes in the retail market, depending upon the character and amount of the goods which had been lost.

In determining the amount of damages in any case where general damages only are claimed, it is the proximate loss with which we are concerned. In all such cases the carrier is bound to pay the value of the goods as such value would have been at the precise time and place of delivery, under conditions there contemplated, if the delivery had been made as agreed. If we have means agreed upon for the ascertainment of that value, as we have here, without resorting to retail prices, then we are not specifically concerned with the latter. The value in the car and the cost of replacement might be two very different things. If we were dealing with carloads of wheat, or cotton, or flour, or lumber, or coal, such value and the cost of replacement would be the same. In such cases courts have sometimes said that the consignee is entitled to recover such sum as would enable him to go into the market and replace that which had been lost. That happened to be true with respect to carload lots, only as the

result of a coincidence. Such are ordinarily cases without special damages, and the ordinary rules apply. The consignee in such cases is entitled to recover the amount of his proximate loss. But in such cases the value per unit of the carload which has been lost is the same as the value per unit of another carload of the same commodity at the same place; the proximate loss and the cost of replacement are the same; and so the statements of the courts above referred to, though literally correct, are misleading if given a more extended application. The statements are true as to that particular class of cases.

There are other classes of cases where such general statements are made by the courts and are then lifted bodily, as it were, and given a broader and inaccurate application elsewhere. We are here concerned with and are speaking of the typical case of general damages,—such as follow naturally and in the usual course of things from the breach, and with values at the precise time and place when and where delivery should have been made,—not at some other time or place. By way of contrast and illustration it is not wholly improper to refer to some of these other classes and to the statements of the court made in reference thereto. In this connection there are the unusual cases of various kinds where under special circumstances, on failure to deliver, the consignee is under some reasonable compulsion to go into the market and purchase at retail. In all such cases his actual loss is measured by the amount he is required to pay. This may occur with reference to many articles or commodities which may be necessary for the daily requirements of
33 the consignee in his private life, or in his occupation or business, and where, if goods purchased do not arrive, he must go into the market and supply them otherwise; or it may be a case where he has already sold the commodity in advance and where he must go into the market to purchase that with which to make up the exact amount which he has lost. All these, however, are usually cases of special damages which require special pleading, and, properly, should be dealt with along those lines, although this point is not always made. Vanderbilt vs. Ocean S. S. Co., 215 Fed. 886,890. Here again, courts may make the general statement that in case of loss in transit the consignee is entitled to recover such sum as will enable him to go into the local market and replace the commodity by a purchase at retail. Such statement, made in general terms, may be correct as applied to the particular case there in hand, but, it may be urged, is incorrect when extended to a case where general

damages only are involved. It will be observed, however, that in all these cases of special damages the consignee obtains no advantage and realizes no profits on the transaction; and the defendant is not mulcted in damages, arbitrarily or unnecessarily, but is required to pay such an amount only as will make the plaintiff whole.

Again, there are the cases where general damages only have been sustained, but where there is difficulty in fixing values as of the time and place of delivery. In such cases it is sometimes necessary to resort to values at the time and place of shipment and therefrom, as nearly as may be, to estimate the value at destination. Northern Commercial Co. vs. Lindblom, 162 Fed. 250, 255. The Arctic Bird, 109 Fed. 167, 175. Sometimes it is necessary to resort to retail prices at destination and therefrom, as nearly as may be, to estimate values in bulk or otherwise at that place. And sometimes, in cases involving single articles, or under unusual circumstances, the retail price at destination is the substantially correct measure of value of the lost article or articles at that place. The question of value at destination is always a question of fact, and it must be determined as other questions of fact are determined, upon the best evidence available for that punrpose. In such cases again, courts sometimes make general statements which give trouble when applied in other cases. It is clear, however, that in cases where the value at destination is agreed upon and is a settled fact, the troubles respecting these matters of evidence do not obtrude.

There was no necessity, occasion or advantage here for the plaintiff to go into the local market for the purpose of purchasing coal with which to replace that which had been lost. There is strong ground for urging that a consignee of commodities in case of their loss in transit has no absolute or universal right to go into the local market at the point of destination and purchase goods at retail, with which to replace that which has been lost. He may do this only to the extent which may be reasonably necessary to protect his rights,—not the sentimental right of having a thing at all hazards, because he has bargained for it, and this without regard to the rights of others, but his substantial rights and interests. He should not be permitted to purchase
34 at retail when this places an excessive burden on others and does himself no good. He may not insist on this one burdensome method of adjustment, when other methods, quite as favorable to himself, and less harsh to

others, are equally available. He should not be permitted to mulct the carrier in an amount in excess of what he has actually suffered. To do so would work an evident injustice. The carrier has some rights, as well as the consignee.

In cases such as this, involving the loss of part of a shipment of a considerable quantity, all to be resold, (and these features are mentioned, not to create a separate class, but because a case of this character serves well as an illustration and covers the case at bar), and where general damages only are involved, it may fairly be said, from what we know of human conduct, not only that the consignee is not obliged to go into the local market and buy, but, more than this, that he never does such a thing, does not wish to make any such purchase, and will not do so unless under some form of compulsion. Moreover, if in this case plaintiff had purchased at retail and had paid $9.70 per ton and had placed his coal in the car to take the place of that which had been lost, the coal so purchased at retail would have been worth $5.75 per ton in the car, and no more. If we compel defendant to reimburse plaintiff on account of the supposed new purchases, we require it to pay $9.70, so that plaintiff may have $5.75. Again, by establishing the rule prayed for by plaintiff, we make assurance doubly sure that under the circumstances here involved, no consignee will ever make a purchase at retail. Such an award as he asks, places him at a substantial advantage over the position in which he would be if he should go into the market and buy. If he should actually buy, he would then have the coal on his hands and would be obliged to sell the same again, either at wholesale, or at retail. If he should sell at wholesale, he would receive $5.75 per ton for the coal. If he should sell at retail and should succeed in making collections he would finally realize the comparatively small amount of profit which the retail business affords; but we are giving him a sure net profit of $3.95 at the outset above the value of the coal in the car, and are relieving him of all care, annoyance, expense and risk of the retail trade in connection therewith. No one would be so stupid as to buy and handle the coal under such circumstances. We have a sure guaranty that he would not. He would keep the money.

8. The stipulation of facts states that all sales of coal of the character here in question, of less than 60,000 pounds, in the local market at the time and place in question, were considered sales at retail. It is further stipulated that the retail market price of 5,500 pounds of such coal at such time

and place was $9.70 per ton. The stipulation does not specify the retail price of quantities of such coal weighing more than 5,500 pounds and less than 60,000 pounds. Drawing upon the current fund of general information for purposes of illustration, we may readily conclude that the retail price holds good for all quantities sold at retail. It is common knowledge that this is so, or that the variation is very slight. A man who buys 5,500 pounds or 2¾ tons of coal, at retail, pays the same price per ton as the man who
35 buys 55,000 pounds, or 27½ tons. As already indicated, the value of the entire carload of coal delivered in plaintiff's yard in Minneapolis, if none had been lost, would have been $255.0125. If all had been lost, the recovery would have been limited to that sum. Under the rule which is being applied in this case, if the weight of the coal which was lost had amounted to 55,000 pounds, plaintiff would be entitled to recover the sum of $266.75, on account of such loss,—an amount substantially greater than he could have recovered if the entire carload had been lost; and in addition thereto he would have on hand that part of the coal which was not lost, amounting to 33,700 pounds. Can this be a correct application of a correct rule?

9. Again, if we assume that the carload of coal in question had been purchased by a wholesale dealer, where does the rule contended for by plaintiff lead us? Confessedly, such wholesaler purchased the entire lot for the purpose of selling again at wholesale. Confessedly, the coal and each ton thereof, in the car would have been worth $5.75. It would sell for that and no more. That is the price which the wholesaler would ask for it and which he would expect to obtain for it, and the price which afterward he would realize therefor, when a sale should be made. The 5,500 pounds of coal is missing. If it had been in the car it would have been worth the same amount per ton as the other coal there, and would have sold for the same price. Under such circumstances is it possible that the wholesaler would have a right arbitrarily to say to the carrier: "I want that coal. It is worth only $5.75 per ton to me. I do not need the coal itself for any purpose. If I receive $5.75 in money for each ton thereof, I would be as well off as if I had the coal; but I want the coal and you must pay me $9.70 per ton for it, because that is the amount I must pay in the local market for other coal to replace that which has been lost." Or might the wholesale dealer in such case go a great deal further, as the plaintiff does in the case at bar, and say: "You

have lost my 5,500 pounds of coal. I do not want it, or need it. I am not going to try to replace it. If I had it here in the car it would be worth only $5.75 per ton. That is my proximate loss. I could not sell it there for more than that amount. I am selling the remainder of the carload at that price. My only loss measured in money is the loss of the value of that coal in the car. But I demand that you pay me for the missing coal the price which I would have to pay for it at retail, if I desired or was obliged to replace it. That is $9.70 per ton." If such a claim should be allowed the wholesaler would be making money fast on lost coal. He would always wish for generous losses on all shipments to him. Admitting that the coal was worth only $5.75 per ton in the car and that if the missing coal had been there, he would have sold it at that price, he is nevertheless demanding $9.70 per ton therefor. It would seem quite improbable that the wholesale dealer would be allowed to successfully make such a claim. Quite clearly he would have to be content with $5.75 per ton. The coal of a retailer in a car, however, is worth no more than the same coal would be worth if owned by a wholesale dealer, and in case of the non-delivery of any part thereof, the loss would be precisely the same. There cannot be one measure of damages for the one dealer and another measure for the other.

36 Again, in testing the general accuracy of the decision here, the following considerations are not without some bearing: The carload of coal as delivered, with the missing coal out, was worth $239.20. If the carload had been intact, it would have been worth $255.0125. If instead of any coal having been lost, the carload of coal had been damaged so that when delivered it was worth only $239.20, then under all the authorities, the amount of recovery would be the difference between the value as actually delivered, and its value as it should have been if delivery had been as agreed. United S. S. Co. vs. Haskins, 181 Fed. 962, 965, Magdeberg, etc. vs. Paulson, 29 Fed. 530, 532-3. Such difference and the amount of such recovery would be $15.8125. But here, where the real loss is confessedly the same, we allow a recovery of $26.675. Or, stated otherwise, if two cars had been shipped, one to each of two separate dealers at the same destination, and if the coal in one car had been damaged in transit, so that on delivery, the carload was worth only $239.20, where it should have been worth $255-.0125, and if from the other car certain coal had been lost in transit, so that such carload when delivered was worth also $239.20, when it should have been worth $255.0125, we

would be allowing a recovery of $15.8125 in one case, and of $26.675 in the other.

10. From the foregoing it is reasonably clear that there is much confusion in the cases, and in the statement of the rules, and in their application to situations which are widely different. It is apparent that distinctions which go well nigh to the root of the matter are sometimes overlooked. These distinctions seem to be vaguely in mind in some instances, where right conclusions are reached, without stating correctly the underlying reasons therefor. We speak of pleading special damages, and of values at the time and place of delivery, and of retail prices, and of profits, and of the right to go into the market and buy, and of the risk, cost and service in connection with retail operations, and of the price at which the commodity in question will sell in the local market. These matters are discussed indiscriminately in all kinds of cases where commodities have been lost in transit.

A distinction between the rule applicable to the loss of a separate article and that applicable to the loss of a larger quantity of merchandise, and especially when the latter is held for resale, is suggested in the quotation from Sutherland on Damages, supra. There is grave doubt whether there is any satisfactory reason, operating uniformly and in all cases, which will support such distinction. Whether the commodity lost was large in quantity, or was a single article; whether the consignee intended to effect a sale at wholesale, or at retail, or intended not to sell at all; whether the commodity was new or secondhand, are all questions of a strictly subordinate character. The one question which is the same in all cases where general damages only are involved, is the value of the lost commodity as that value would have been at the time and place of delivery under the conditions there contemplated, if delivery had been made as agreed. The apparent difficulty with different cases, and in the application of the rules thereto, is often in the evidence necessary and in the application thereof. It often occurs that the value of a large quantity of any commodity is not
37 the same as the retail price at which such commodity is being sold in the local market. It is not always so easy to prove the value of a single article at a given point without inquiring into the prices there prevailing at retail; but if the value of a separate article at a given point is

shown to be different from the retail price of such article in the local market, such article then takes the same course as the commodity in large quantity and is dealt with the same; and it should be clearly understood that the only legitimate purpose of consulting local retail prices in any such case is for the light, if any, direct or indirect, which a knowledge of such prices may shed upon the ultimate questions of value above referred to. It is a course of procedure, not at all controlling, but advisory, which is employed in determining that value. No recognition is involved of any arbitrary right on the part of the claimant in such cases to go into the local retail market under any and all circumstances, and there make an actual purchase.

11. If the foregoing observations be deemed mainly or largely incorrect, or inconclusive, they will be disregarded. If, in the main, they shall be found to be correct, it may perhaps be considered, with reference to the first two classes hereinbefore referred to, in the first of which falls the case at bar, that the rules applicable thereto should be as next hereinafter set forth, with such variations therein as may seem proper.

a. In the usual or ordinary case involving general damages only, where the commodities have been lost in transit and where the loss thereby sustained is such only as follows naturally or in the usual course from such loss:

Under such circumstances the single question is the amount of the proximate loss which has been sustained, and this in turn means what would the lost commodity have been worth in money at the precise time and place and under the conditions of the contemplated delivery, if delivery had been made as agreed.

If, by admission, or otherwise, on all the evidence, it is established that at such time and place the true value of the lost commodity was other than and different from the price at which such commodity was being bought and sold at retail in the local market, then such established value will be the measure of recovery; and the retail price will not prevail as a measure of recovery merely because that is the amount for which the plaintiff might have been able to sell the missing commodity at retail, or because, if he wished to replace the same, he would have been obliged to pay such retail price for the commodity with which to make such replacement.

If on the other hand, in such a case, either from absence or insufficiency of evidence, it is not satisfactorily establish-

ed that the true value of the missing commodity, at the time and place of delivery, would have been an amount other than and different from the retail price thereof in the local market, then evidence of such retail price may be of greater weight and importance; and where it is sufficiently persuasive of the true value, it may be accepted as indicating
38 the proper measure of recovery. It is the value on the spot as that value would have been if the commodity had been delivered as agreed, with which we are concerned. That measures the proximate loss sustained by the consignee. It may, in certain cases, be the same as the retail price.

b. In the unusual case involving special damages, where the commodities have been lost in transit, and where by reason of special circumstances, the consignee has been under some reasonable compulsion to go into the local market and supply himself with the commodities which have been lost:

In cases under this head the consignee must pay the going price. If the goods which were lost consisted of carload lots, he then pays the price at which such quantities may be obtained. If the amount which he must have is obtainable at retail only, he must pay the retail price. Under such circumstances he must pay a certain amount to cover the cost of selling goods at retail and he must pay the retailer's profit. in justice to the carrier he should purchase at the lowest price at which the commodity is reasonably available. There is no question about the rule under such conditions. If the consignee pleads and proves the special circumstances, and that he was under reasonable compulsion to go into the local market and purchase either at wholesale or retail, and that such consequences were in the contemplation of the carrier and himself when the shipment was made, he may recover the amount which he was compelled to pay.

There are other cases involving the loss of commodities in transit which wall outside any of the foregoing classes. Such cases are comparatively few in number and usually are of minor importance, although this may be otherwise. There is the case of the loss of goods purchased for a seasonal market, by a retailer, under circumstances such that they cannot be replaced in time to meet the trade. Examples of this are certain classes of women's wear which are sold at a particular time of the year, and toys purchased for the Christmas trade. In such cases the merchant loses the season's sale of such goods and the profits which would have ac-

crued thereon. Under such circumstances the questions of what the goods could be bought for at destination, or what they would have been worth on the spot where they should have been delivered, are not important. The only questions are what they would have sold for at retail, and what the net profits would have been thereon. In such special cases the merchant is usually allowed such net profits on the anticipated sales. That would be his actual loss.

Again, there is the loss of machinery, or parts thereof necessary in carrying on industrial or mechanical operations, where the effect of such loss is to suspend such operations and causes inconvenience and loss. If such consequences were in contemplation of the parties, a recovery may be had on account thereof.

There are also cases, where a single article of value is lost in transit, or where partially used household goods, or wearing apparel, or mechanical equipment are lost, and where there is no standard of value applicable thereto, except the current prices at retail. In such cases those prices
39 are sometimes allowed to control as being the best evidence obtainable, or they are used as a standard from which deductions may be made. Such cases, however, often fall within the class where the consignee is under the reasonable compulsion of going into the market and replacing the lost commodity by purchase at retail. The real reason for allowing a recovery on the basis of the retail price, therefore, is sometimes not celar.

These latter classes are all special in their nature and special rules for estimating the amount of the damages are applied.

12. Aside from the few citations hereinbefore made, the authorities generally applicable in this case are referred to in the two aforementioned opinions therein. There is no differenec of opinion between the parties as to the rule for determining the amount of plaintiff's damage,—the value at the time and place delivery should have been made. The sole dispute arises over our resort to retail prices in determining that value when the value already has been agreed on before and without such reference.

Various cases are cited where, in a general way, and for one reason or another, the courts say that in the particular case there in hand, the plaintiff should recover such amount as would enable him to enter the local market and replace

that which had been lost. Generally there is no quarrel with such cases. More common still is the general statement that plaintiff is entitled to recover the value or market value of the commodity lost at the place of destination.

13. At the time this case was first decided the one case, which, arguendo, most strongly and directly supported plaintiff's claims was Heidritter Lbr. Co. vs. Central R. Co. (N. J.) 122 Atl. 691, 692. Since then, to the same effect, has been decided the case of Leominster Fuel Co. vs. New York, N. H. & H. H. R. Co. (Mass.) 154 N. E. 831. The latter case rests on the authority of the Heidritter case, and the decision by the Court of Appeals in the case at bar. In both the Heidritter case and the Leominster case, the most distinguishing and controlling feature of the case at bar was entirely absent. Reference is now made to the value, established by agreement of the parties, which the coal in question would have had in car at destination if delivery had been made as agreed. This feature was not sufficiently stressed by this court in its earlier opinion.

In the Heidritter case it was said that "the real question at issue is whether the plaintiff was entitled to recover the retail value at destination, rather than the wholesale value at the point at shipment." p. 691. In the Leominster case the alternative allowed by the evidence was the cost of the coal at the mine, plus freight, which defendant claimed was the true basis of recovery, and the retail price of such coal at the yards of dealers, or such price delivered in plaintiff's yard. Plaintiff claimed a recovery on the latter basis and such claim was allowed. In both cases it was held, in effect, that the plaintiff should recover on the theory that he had a right to go into the local market and replace the lost commodity by purchase at retail, which theory, for the reasons hereinbefore set forth should not be conceded. It will be observed that each of these two cases are within a much narrower compass than the case at bar.

We are dealing here with a commodity which has two well recognized values or prices in the same market: One is the value or price at wholesale, when we are dealing with lots of 60,000 pounds or over; the other the value at the end and of after a considerable amount of service and expense and risk, which we call the value or price at retail. The loss here is part of a wholesale shipment. Shall we apply the retail price in determining the loss or damage sustained? It is believed that aside from the decisions by the Court of Appeals,

the two cases above cited are the authorities which tend most directly to support plaintiff's views. Aside from the Heidritter case, the authorities cited in the decision of the Court of Appeals in support thereof, in the main, are content with announcing the general rule. The Yazoo case therein cited will be later referred to. The case of Cutting et al vs. Grand Trunk Ry. Co., 13 Allen, 381, also cited, was a case of replevin for a quantity of flour which the defendant had refused to deliver until certain charges thereon claimed by defendant should be paid. The court states the rule for the measure of damages in cases such as this, pp. 384, 385, and in connection with the discussion as to the measure of damages where there has been a delay in the delivery of goods, and a fall in the market value meantime, makes the statement quoted in the decision of the Court of Appeals herein. That excerpt and the decision throughout rests on the general statement of the value, or the market value of the goods at destination. The discussion goes no further. Profits are disallowed, p. 386, and at p. 387, it is said: "Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods." The general effect of this would be to hold plaintiff here to the value in the car. We, however, are asked to go much further than the allowance of profits. We are asked to allow and pay plaintiff for expenditures which he does not make, and for services which he does not render, and for risks which he does not take.

14. In opposition to the claims of plaintiff are a considerable number of cases which decline to adopt the retail market value as the measure of damages in cases such as this. They do not all employ the same reasoning, nor reach precisely the same results, but are all agreed in rejecting the retail price standard.

Brown Coal Co., vs. Illinois Central R. Co., 196, Iowa, 562, is a carefully considered case. If the foregoing views are correct, the court there should have allowed a recovery based on the value of the coal in the car at destination. There is some ground for urging, however, that there is no clear evidence of such value.

Yazoo & M. V. R. Co. vs. Delta Grocery & Cotton Co. (Miss.) 98 So. 777, was an action to recover the value of certain flour lost or damaged in transit. It is there
41 stated that "the exact point in controversy is whether the appellee, a wholesale grocer, is entitled to recover
* * * the invoice or cost price, plus freight," of the damaged

flour, "or the resale value, (that is the price at which the flour could have been sold, or, as we will say, the reasonable cash market value) at the point of destination." p. 777. • • • "The damaged flour cost plaintiff $10.44 per barrel delivered at Clarksdale. Plaintiff recovered $11.30 per barrel for the damaged flour, which represents what plaintiff could have sold the flour for, or its reasonable wholesale cash market value at the point of destination." This wholesale cash market value is what defendant contends for here as the proper measure of recovery.

H. T. Cottam & Co. Inc. vs. Illinois Central R. Co., 3 La. Court of Appeal Reports, 240, was decided in October, 1925. The case was presented in such a way that contemplated profits occupied an important place in the case. These were disallowed and plaintiff held to the original cost of the merchandise, plus freight.

In Central Georgia R. Co. vs. American Coal Co. 28 Ga. App. 95, certain coal was lost in transit from a carload shipment. Plaintiff was limited in its recovery to the wholesale price at point of destination.

For further cases which decline to adopt the local retail price as the measure of damages in such cases, see the following authorities:

Chicago, R. I. & P. R. Co. vs. Broe, 16 Okla. 25.

Texas & Pac. R. Co. vs. Payne, 15 Tex. Giv. App. 58.
State vs. Smith, 31 Mo. 566.

Cincinnatti N. O. & T. P. R. Co., vs. Hansford, 125 Ky. 37. In this case the evidence showed that the lost goods cost $317. and that if they had been received and sold at retail, a profit of $105.66 would have been realized thereon. There was no evidence as to what their value would have been at destination, or that it would have been more than the cost price. On that ground, as stated in the opinion, a recovery was limited to $317. and the prices at retail were disregarded.

Quanah A & P. Co. v. Novit (Tex. Civ. App.) 199 S. W. 496.

15. For the reasons stated near the beginning of this opinion judgment will be entered allowing plaintiff a recovery at the rate of $9.70 per ton for the coal which was lost.

Dated September 23, 1927.

WM. A. CANT,
U. S. District Judge.

(Endorsed): Filed Sept. 23, 1927, Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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42 Petition for Writ of Error

To the Hon. William A. Cant, Judge of the District Court aforesaid:

Now comes Illinois Central Railroad Company, a corporation, the defendant in the above entitled action, and states that on the 23rd day of September, 1927, the above named Court entered a judgment in said cause in favor of the plaintiff and against the defendant for Thirty Four and 58/100 ($34.58) Dollars, and costs, in which judgment and proceedings had therein in this cause certain errors were committed to the prejudice of this defendant, which errors will more in detail appear from the Assignments of Error herewith annexed and filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf, returnable to United States Circuit Court of Appeals, Eighth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals, and that the judgment aforesaid be there reversed.

Dated at Minneapolis, Minnesota, this 22nd day of October, 1927.

EDWARD C. CRAIG
Edward C. Craig,
Chicago, Illinois.

GUESMER, CARSON,
BROWN & LOUGHIN,
Guesmer, Carson, Brown &
Loughin,

EDWIN C. BROWN,
Edwin C. Brown,
1000 Met. Life Bldg.
Minneapolis, Minn.
Attorneys for Defendant.

(Endorsed) Filed Oct. 22, 1927, Joel M. Dickey, Clerk, by Thomas H. Howard. Deputy.

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43 Assignments of Error

Now comes Illinois Central Railrod Company, a corporation, the defendant in the above entitled cause, and in connection with its petition for writ of error in this cause assigns the following errors defendant avers occurred in the entry of judgment in said cause and in the proceedings prior thereto, and upon which it relies to reverse the judgment entered herein.

That the District Court erred:

I.

In finding and adjudging that the revised stipulation of facts, dated September 27, 1926, did not materially differ from the stipulation of facts, dated April 6, 1923, on the former trial and before the Circuit Court of Appeals, which said finding is expressed in and by the Court's order for judgment herein and in and by the following portion of its memorandum, made a part of said order, that

"This court is not satisfied that the amended stipulation of facts justifies the conclusion that the case has been substantially changed,"

in that the revised stipulation shows the following facts not shown by the original stipulation, to wit:

1. That plaintiff, during all the times in question in the case, "has conducted his said business in all respects in a manner substantially similar to the manner in which other similar fuel businesses in Minneapolis aforesaid were then conducted". (I b of the revised stipulation of facts).

2. That by the terms of the transportation contract between the parties, the place for delivery of the car of coal in question was "on the said industry track at the plaintiff's coal yard at Minneapolis, Minnesota" (I c, and III b
44 and c), and not at plaintiff's yard at Minneapolis, Minnesota, and that "Defendant's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track." (VIII).

3. That the subject matter of the transportation contract between the parties was a carload or wholesale quantity of coal, and that the quantity of coal delivered by the defendand to plaintiff was likewise a carload or a wholesale quantity of coal; the terms "carload" and "wholesale" quantities of coal are defined in the revised stipulation. (III a, and IV a).

4. That the coal which defendant failed to deliver was, in the contemplation of the parties, a "portion of a carload" as such, and not a "retail" quanity as such. (III c, and V a).

5. That the unloading of the coal from the car was to be done by the plaintiff (V b and c), and the unloading of the coal "and the further handling of the same for sale or delivery in less than carload lots was at the expense of the plaintiff" (VIII), and that the agreed destination market value of the coal which was the subject of this shipment, in the car at the time and place of delivery or at the time when and the place where delivery should have been made by defendant, was $5.57 and no more per ton. (V c).

6. That "at and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid" (V d), and that at and prior to the time of delivery of this shipment it was not customary for plaintiff or any other dealer to replace less than carload losses by purchasing the lost quantity of coal. (VIII).

7. That at and prior to the time of delivery herein, it was the ordinary and customary practice for "other fuel dealers" at Minneapolis, as well as for plaintiff, to maintain their stocks of coal exclusively by making later purchases of coal in carload lots in the regular and customary course of business, and not by the purchase of coal, at destination or
45 otherwise, in less than carload quantities. (VIII).

8. That plaintiff did not at any time purchase any coal for the purpose of replacing any coal lost from this shipment, "except the purchase in carload lots to maintain his stock or said Southern Illinois No. 2 nut soft coal, of that kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business". (VIII).

9. That the coal delivered by defendant was "added to the general stock of coal of the plaintiff at Minneapolis, aforesaid, and had this 5500 lbs. of coal been contained in this car it would have been added to the general stock of coal of the plaintiff at Minneapolis, aforesaid," and that "the failure to receive the 5500 lbs. of coal aforesaid in no way interfered with the maintaining by the plaintiff of his ordinary and usual stock of coal" (VIII).

II.

In finding, as one of the material facts in the case, contrary to defendant's objections to admissibility on the ground that

said evidence and facts were immaterial and irrelevant to any issue in the case, that:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price (of $5.50 per ton f. o. b. shipping point)." (Paragraph 5 of Findings of Fact).

III.

In finding, as one of the material facts in the case, contrary to defendant's objections to admissibility on the ground that said evidence and facts were immaterial and irrelevant to any issue in the case, that:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price (of $5.75 per ton)". (Paragraph 6 of Findings of Fact).

IV.

In finding, as one of the material facts in the case, con-
46 trary to defendant's objections to admissibility on the ground that said evidence and facts were immaterial and irrelevant to any issue in the case, that:

"That on or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable and average market value and price of coal such as that here involved, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5,500 pounds, was $13. per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less than said amount." (Paragraph 7 of Findings of Fact).

V.

In denying, in and by its order for judgment herein, defendant's motion for an order striking from the record as immaterial and irrelevant to any issue in the case the following portion of paragraph (b) of V of the stipulation of facts:

"Quantities of less than carloads were not obtainable in said market at said time and place at said price."

VI.

In denying, in and by its order for judgment herein, defendant's motion for an order striking from the record as immaterial and irrelevant to any issue in the case the following portion of paragraph (c) of V of the stipulation of facts:

"Quantities of less than carload lots were not obtainable in said market at said time and place at said price."

VII.

In denying, in and by its order for judgment herein, defendant's motion for an order striking from the record as immaterial and irrelevant to any issue in the case the following portion of paragraph (d) of V of the stipulation of facts:

"On or about October 17, 1922, at Minneapolis, Minnesota, the fair, reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to the purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

47

VIII.

In denying, in and by its order for judgment herein, defendant's motion for judgment in favor of plaintiff and against the defendant for the sum of $15.82, and interest and costs to October 29, 1926, the date of said motion, as the value of the coal not delivered by defendant, based and computed on the agreed carload market value of the coal at Minneapolis on the date of delivery, $5.75 per ton.

IX.

In denying in and by its order for judgment herein, defendant's motion for judgment in favor of plaintiff and against the defendant for the sum of $15.82, and interest and costs, based upon the destination value of coal not delivered, $5.75 per ton, expressly agreed to by the parties in and by the following paragraph V (c) of the stipulation of facts, as the fair, reasonable value, at the time and place of delivery, of the coal not delivered by defendant:

"On or about October 17, 1922, the fair, reasonable and average market value and price at Minneapolis, Minnesota, of carload lots of Southern Illinois No. 2 nut soft coal on track at Minneapolis, as aforesaid, including the said industry track, was $5.75 per ton, plus freight, where the purchaser paid the freight, received the shipment on track, and himself unloaded the shipment as was done by the plaintiff in this case."

X.

In holding and adjudging, in disregard of the express agreement of the parties that the fair, reasonable value of the

coal at the time and place of delivery was $5.75 per ton, as expressed in paragraph V (c) of their stipulation of facts herein, that the coal not delivered by defendant was worth, and that plaintiff's damages suffered by the non-delivery by defendant amounted to, more than the agreed value, $5.75 per ton, of the coal not delivered.

48 XI.

In holding and adjudging that the amount of plaintiff's full actual loss and damages, suffered as the proximate result of defendant's breach of contract under the facts in evidence in this case, should be measured and computed at the rate of $9.75 per ton, instead of at the rate of $5.75 per ton, for the coal not delivered.

Wherefore, defendant prays that the judgment of said District Court be reserved.

EDWARD C. CRAIG
Edward C. Craig,
Chicago, Illinois.

GUESMER, CARSON, BROWN & GUESMER
Guesmer, Carson, Brown & Loughin,

EDWIN C. BROWN
Edwin C. Brown,
1000 Met. Life Bldg., Minneapolis, Minnesota.
Attorneys for Defendant.

(Endorsed). Filed Oct. 22, 1927. Joel M. Dickey, Clerk, By Thomas H. Howard, Deputy.

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49 Waiver of Bond on Writ of Error.

G. I. Crail, the plaintiff above named, through his undersigned attorney, Stanley B. Houck, hereby waives any bond or undertaking on the part of the defendant, whether for costs or damages or for any other purpose, in connection with defendant's petition directed to the Court above named for a writ of error returnable to the United States Circuit Court of Appeals, Eighth Circuit, for the correction of the errors complained of in said petition and in the Assignments of Error annexed thereto, and hereby consents that the writ of error when issued may operate as a supersedeas and stay of execution on the judgment herein entered and as a stay of all proceedings herein except on the writ of error, with the same

force and effect as if bond on writ of error were filed and approved by said court.

Dated at Minneapolis, Minnesota, this 22nd day of October, 1927,

STANLEY B. HOUCK
Stanley B. Houck,
Attorney for Plaintiff.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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50 Order Allowing Writ of Error.

Defendant in the above entitled action, having filed in this Court a petition praying that a writ of error issue, returnable to the Circuit Court of Appeals, Eighth Circuit, for reversal of the judgment heretofore entered herein by the above named United States District Court on the 23rd day of September, 1927, in favor of the plaintiff and against the defendant for the sum of Thirty Four and 58/100 ($34.58) Dollars, and costs; and defendant having also filed a waiver by plaintiff of any bond or undertaking, it is hereby

Ordered that the said petition be and the same hereby is granted and that a writ of error be and the same hereby is allowed and ordered issued as prayed for; and it is further

Ordered that the writ of error, in conjunction with plaintiff's said waiver of bond or undertaking, shall operate as a supersedeas and stay of execution on the judgment entered herein and as a stay of all proceedings herein except on the writ of error with the same force and effect as if bond on writ of error were filed and approved by this court.

Dated at Minneapolis, Minnesota, this 22nd day of October, 1927.

WM. A. CANT
United States District Judge.

(Endorsed) Filed Oct 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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51 (Writ of Error and Clerk's Return.)

United States of America, ss.

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States, for the District of Minnesota, Fourth Division—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District

Court, before you, at the March Term, 1927, thereof, between G. I. Crail, doing business as P. McCoy Fuel Company, Plaintiff, and Illinois Central Railroad Company, Defendant, manifest error hath happened, to the great damage of the said defendant as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit of Appeals, for the Eighth Circuit, on or before the 21st day of December, 1927, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 22nd day of October, A. D. 1927.

Seal
U. S. Dist. Court
Fourth Div.
Dist. of Minn.

Issued at office in Minneapolis, Minnesota, with the seal of the District Court of the United States, for the District of Minnesota, Fourt Division.

JOEL M. DICKEY
Clerk of the District Court of the United States, for the District of Minnesota.
By Thomas H. Howard,
Deputy.

Allowed by William A. Cant, Judge.

United States of America,
District of Minnesota,
Fourth Division—ss.

In obedience to the command of the above writ, I herewith transmit to the United States Circuit Court of Appeals, for the Eighth Circuit, a duly certified transcript of the record

and proceedings in the within-entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the Seal of the District Court of the United States for the District of Minnesota, Fourt Division.

Seal
U. S. Dist. Court
Fourth Div.
Dist. of Minn.

JOEL M. DICKEY
Clerk of the District Court of the United States, for the District of Minnesota.
By Thomas H. Howard,
Deputy.

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52 Citation and Admission of Service

United States District Court, District of Minnesota, Fourth Division.

G. I. Crail, doing business as P. McCoy Fuel Company,
Plaintiff,
vs.
Illinois Central Railroad Company, Defendant.

United States of America, to G. I. Crail—Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States District Court, District of Minnesota, Fourth Division, wherein you are plaintiff and Illinois Central Railroad Company is defendant, to show cause, if any there be, why the judgment rendered against the said defendant, as in said writ of error mentioned, should not be corrected, and why speedy jurisdiction should not be done to the parties in that behalf.

Witness, the Honorable William A. Cant, Judge of the United States District Court, this 22nd day of October, A. D., 1927.

WM. A. CANT
Judge of said Court.

Due and personal service of the foregoing Citation, by copy, at Minneapolis, Minnesota, is hereby admitted this 24th day of October, 1927.

STANLEY HOUCK
Attorney for Defendant in Error.

Filed in U. S. District Court on October 24, 1927.

53 Praecipe for Transcript

To the Clerk of the above named Court:

Please make return to the United States Circuit Court of Appeals, Eighth Circuit, upon the Writ of Error in the above entitled cause, and include in the transcript of record the judgment roll and the papers and documents listed in the Stipulation as to Printing Record filed herewith.

EDWARD C. CRAIG
GUESMER, CARSON, BROWN & LOUGHIN
EDWIN C. BROWN
Attorneys for Illinois Central Railroad Company, Defendant and Plaintiff in Error.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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54 Election as to Printing

The Defendant and Plaintiff in Error in the above entitled action hereby files in the office of the Clerk of said Court a notice of his election to take and file in the United States Circuit Court of Appeals for the Eighth Circuit, to be printed under the supervision of its Clerk, under the rules, a transcript of the record in said action.

EDWARD C. CRAIG
GUESMER, CARSON, BROWN & LOUGHIN
EDWIN C. BROWN
Attorneys for Illinois Central Railroad Company, Defendant and Plaintiff in Error.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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55 Stipulation as to Printing Record

It is hereby stipulated and agreed that the following named portions of the record herein and none other shall be printed for use on the hearing in the United States Circuit Court of Appeals, Eighth Circuit, on the writ of error herein, to-wit:

The complaint; answer; original stipulation of facts dated April 6, 1923; bill of exceptions; stipulation for approval of bill of exceptions; certificate of District Judge to bill of exceptions; findings of fact, conclusions of law, order for judgment, and memorandum of the District Court; judgment of the Court; petition for writ of error; assignments of error; waiver of bond on writ of error; order allowing writ of error, writ of error and Clerk's return; citation and admission of service; praecipe for transcript; election as to printing;
56 this stipulation and Clerk's certificate to transcript; and it is agreed that printing of the title may be omitted as to each of the above except as to the complaint.

And said parties hereby designate the above mentioned portions of said record as parts thereof which they deem necessary or material for the consideration of the errors assigned.

Dated this 24th day of October, A. D. 1927.

EDWARD C. CRAIG
GUESMER, CARSON, BROWN & LOUGHIN
EDWIN C. BROWN
Attorneys for Plaintiff in error.

STANLEY HOUCK
Attorney for Defendant in error.

(Endorsed) Filed Oct. 22, 1927. Joel M. Dickey, Clerk. By Thomas H. Howard, Deputy.

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57 (Clerk's Certificate to Transcript.)

United States of America, District Court of the United States, District of Minnesota, Fourth Division.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the following, consisting of 56 pages, numbered consecutively from

1 to 56, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein

G. I. Crail, doing business as P. McCoy Fuel Company, is plaintiff, and

Illinois Centrail Railroad Company is defendant, and of the whole thereof (except as modified by the praecipe of said defendant to be found at page 53 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with proof of service thereof.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Minneapolis, in the District of Minnesota, this 25th day of October, A. D. 1927.

Seal
U. S. Dist. Court
Dist. of Minn.
Fourth Div.

JOEL M. DICKEY,
Clerk,
By Thomas H. Howard,
Deputy Clerk.

Filed Oct. 27, 1927. E. E. Koch, Clerk.

52 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals Eighth Circuit.

Illinois Central Railroad Company, Plaintiff in Error,
No. 8014. vs.
G. I. Crail.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

EDWARD C. CRAIG,
Chicago, Ill.

ARNOLD L. GUESMER,
HARRY S. CARSON,
EDWIN C. BROWN,
CHAS. A. LOUGHIN,
Minneapolis, Minn.,
1000 Metropolitan Life Bldg.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 31, 1927.

(Appearance of Counsel for Defendant in Error.)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

STANLEY B. HOUCK.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 30, 1927.

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53 (Order of Submission.)

May Term, 1928.

Wednesday, May 9, 1928.

Before Judges Kenyon, Symes and Martineau.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Edward C. Craig for plaintiff in error, continued by Mr. Stanley B. Houck for defendant in error and concluded by Mr. Edwin C. Brown for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Order Vacating Submission and Setting Cause for Hearing on January 9, 1929, with Leave to File Further Briefs.)

September Term, 1928.

Saturday, December 1, 1928.

It is ordered by this Court that the submission of this cause to this Court, be, and the same is hereby, vacated and set aside, and this cause is hereby set for reargument and submission at the foot of the calendar for Wednesday, January 9, 1922, with leave to counsel for the respective parties to file further briefs if they so desire.

December 1, 1928.

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54 (Order of Submission.)

December Term, 1928.

Saturday, January 12, 1929.

Before Judges Lewis, Kenyon and Cotteral.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Edward C. Craig for plaintiff in error, continued by Mr. Stanley B. Houck for defendant in error and concluded by Mr. Edwin C. Brown for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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55 (Opinion.)

United States Circuit Court of Appeals Eighth Circuit.

December Term, A. D. 1928.

Illinois Central Railroad Company, Plaintiff in Error,
No. 8014. vs.
G. I. Crail, doing business as P. McCoy Fuel Company,
Defendant in Error.

In Error to the District Court of the United States for the District of Minnesota.

Mr. Edward C. Craig and Mr. Edwin C. Brown (Mr. R. V. Fletcher and Messrs. Guesmer, Carson, Brown & Loughin were with them on the brief), for plaintiff in error.

Mr. Stanley B. Houck (Mr. W. Yale Smiley was with him on the brief), for defendant in error.

Before Lewis, Kenyon and Cotteral, Circuit Judges.

Kenyon, Circuit Judge, delivered the opinion of the court.

This case, involving the amount of recovery for the loss of five thousand five hundred pounds of coal in transit, is here for the second time on writ of error from the District Court of the United States for the District of Minnesota. The judgment originally entered by the trial Court was reversed by this Court, and the case remanded to the District Court with instructions. Crail vs. Illinois Central R. Co., 13 F. (2d) 459. The trial Court in rendering judgment delivered an extended opinion, which will be found in 21 F. (2d) 836

Reference to these two decisions will give full enlight-
56 enment as to the facts. The case was originally tried under a stipulation waiving a jury, and also a stipulation of facts. It is unnecessary to set forth this stipulation. Upon the second trial in the District Court after the reversal of judgment by this Court an amended stipulation of facts was entered into, which differed only slightly from the stipulation in the first case. It is claimed by plaintiff in error that the new amended stipulation was sufficient to constitute the case a different one from the case made at the first trial. The trial Judge held that it did not substantially change the case, and entered judgment in accordance with the opinion of this Court. We are satisfied that the case now presented is the identical one presented to this Court and decided in 13 F. (2d) 459. We are therefore confronted with the question as to whether or not on the second writ of error we should reconsider the legal question decided when the case was here before, i. e., the rule of damages to be applied for the loss of the coal in shipment. The rule laid down by this Court in its former decision became the "law of the case." While it is within the power of the courts to disregard the rule of "law of the case" in the interest of justice, it is the general practice of courts to refuse "to reopen what has been decided." Supervisors vs. Kennicott, 94 U. S. 498; Clark vs. Keith, 106 U. S. 464; Thompson vs. Maxwell Land Grant Co., 168 U. S. 451; Messenger vs. Anderson, 225 U. S. 436; National Bank of Commerce vs. United States, 224 F. 679; United Press Ass'ns vs. National Newspapers Ass'n, 254 F. 284; Chase vs. United States, 261 F. 833; City of Seattle vs. Puget Sound Power & Light Co., 15 F. (2d) 794. We are satisfied that the situation presented here is one calling

for the application of the rule of "law of the case", and we so hold. Affirmed.

Filed February 20, 1929.

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57 (Judgment.)

United States Circuit Court of Appeals Eighth Circuit.

December Term, 1928.

Wednesday, February 20, 1929.

Illinois Central Railroad Company, Plaintiff in Error,
No. 8014. vs.
G. I. Crail, doing business as P. McCoy Fuel Company.

In Error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that G. I. Crail, doing business as P. McCoy Fuel Company have and recover against Illinois Central Railroad Company the sum of Twenty Dollars for his costs herein and have execution therefor.

February 20, 1929.

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58 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the

rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Illinois Central Railroad Company was Plaintiff in Error and G. I. Crail, doing business as P. McCoy Fuel Company, was Defendant in Error, No. 8014, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of March, A. D. 1929.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 27, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.